Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *Canada Employment Insurance Commission v. V. L.,* 2016 SSTADEI 167

Tribunal File Number. AD-15-1084

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

V. L.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: March 29, 2016

DECISION: Appeal allowed

Canada

DECISION

[1] The appeal is allowed. The decision of the General Division member is rescinded, and the determination of the Commission is restored.

INTRODUCTION

[2] On September 18, 2015, a General Division member allowed the Respondent's appeal against the previous determination of the Commission.

[3] In due course, the Commission filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] On March 3, 2016, a teleconference hearing was held. Both the Commission and the Respondent attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ANALYSIS

[6] This is a case of misconduct.

[7] The Commission submits that the General Division member erred by failing to explain why he disregarded the Employer's evidence as he should have done, and also erred by considering irrelevant factors in determining that the Respondent did not commit misconduct. They ask that their appeal be allowed.

[8] The Respondent argues that the General Division was right to find that other than this alleged incident he was an excellent employee who did not receive progressive discipline before being dismissed, and that any shouting that took place between the Respondent and his Employer was spontaneous and not "willful" as required by the law and jurisprudence. He asks that the appeal be dismissed.

[9] In his decision, the General Division member correctly stated the appropriate law to be applied in cases of misconduct, and cited appropriate case law. He then found that "there is no real evidence of wilfullness [sic] on the part of [the Respondent] who verbally lashed out when confronted [by the Employer]". Having made that finding, he went on to conclude that the Respondent had not committed an act of misconduct and allowed the appeal.

[10] Unfortunately, by doing so the member erred in law.

[11] As stated by the Federal Court of Appeal in *Canada (Attorney General) v. Marion*, 2002 FCA 185, at paragraphs 2 and 3:

> … The ground for the Board's decision was that the dismissal without notice of an employee with 14 years of service in these circumstances, when it was his first offence of that nature, was an excessive and unfair penalty…
>
> The role of the Board of Referees was to determine not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal, but rather whether the employee's conduct amounted to misconduct within the meaning of the [Employment Insurance] Act…

[12] Contrary to the above case (and many similar cases), the member (at paragraph 24 and 32) appeared to attach importance to the Respondent's work history in determining whether or not misconduct occurred and thereby erred in law.

[13] The General Division member also misunderstood the meaning of "willful" as it applies to misconduct when the member appeared to exonerate the Respondent (at paragraph 23) for having acted "in a moment of anger".

[14] In *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, the Federal Court of Appeal set out at paragraph 14 the general principle that:

> "Thus, there will be misconduct where the conduct of a claimant was willful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."

[15] The Court expressed this even more clearly in *Canada (Attorney General) v. Kaba*, 2013 FCA 208, saying that:

> "However, the above factors and the fact that [the claimant] acted on the spur of the moment are not relevant to determining whether there was misconduct. [The claimant] should have known that his conduct could lead to his dismissal…"

[16] By not considering and properly applying the jurisprudence of the Court as to the correct meaning of the term "willful", the member erred in law.

[17] As noted above, the General Division member found at paragraph 28 that the Respondent "verbally lashed out" at his Employer. Applying the above jurisprudence to this fact results in the inevitable conclusion that the Respondent must have been aware that shouting at his boss might result in him being fired, whether or not violent threats were uttered. As such, I find that the Respondent's actions do indeed constitute misconduct.

[18] Because of the above findings, it is not necessary for me to address the Appellant's remaining grounds of appeal.

CONCLUSION

[19] Therefore, the appeal is allowed. The decision of the General Division member is rescinded, and the determination of the Commission is restored.

Mark Borer

Member, Appeal Division